

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Application of Robert L. Popp et al. Art Unit 3761
Appeal No. 2008-0182
Serial No. 10/038,818
Filed December 31, 2001
Confirmation No. 9058
For MECHANICAL FASTENING SYSTEM FOR AN ABSORBENT ARTICLE
Examiner Karin M. Reichle

March 13, 2008

REQUEST FOR REHEARING UNDER 37 C.F.R. §41.52

This is a request for rehearing under 37 C.F.R. §41.52 from the Board of Patent Appeals and Interferences affirmation of the Examiner's rejection made in the Decision on Appeal decided January 25, 2008.

The Board Misapprehended the Disclosure of Hetzler

The Board misapprehended the disclosure of U.S. Patent No. 5,910,136 (Hetzler). Specifically, the Board misapprehended that the material labeled "Sample A" in Table II of Hetzler has a machine direction elongation of 263% in its final form (i.e., as used in the diaper). Rather, Sample A was elongated 263% during an intermediate step of its manufacture. That is, during the process of making Sample A, it was heated to 205°, elongated 263% while heated to 195°, and then annealed at 230°. See Table II of Hetzler, which provides the process temperatures in the third column thereof. There is no teaching or suggestion by Hetzler, however, that the sample is capable of such elongation after it has been annealed, which is the final form of the material.

The Board's misapprehension permeated throughout the Board's decision and appears to be a critical factor in the Board reaching the decision that it did. For example, in

upholding the Office's rejection of claims 19 and 25 as being anticipated by Hetzler, the Board stated

"Hetzler teaches that the laminate of sample A of Hetzler's invention had a peak machine direction elongation of 263%." See page 5, lines 14 and 15 of the Board's Decision.

"In fact, Hetzler exemplifies in Table II, a preferred material termed laminate A that has peak machine direction elongation of 263% (FF 7)." See page 6, lines 5-7 of the Board's Decision.

"[W]e conclude that 263% elongation would represent 2.63 times the relaxed length, which is at least about 2.0 as required by claim 19 and at least about 2.5 as required by claim 25." See page 6, lines 9-11 of the Board's Decision.

"Hetzler's disclosure of a particular material that can be stretched 2.63 times its relaxed length in table II factually contradicts Appellants' argument." See page 6, lines 14-16 of the Board's Decision.

"Hetzler teaches a preferred material in Table II which meets the extensibility requirements and teaches the use of the inventive material as an elastic for hook and loop closures on diapers." See page 7, lines 17-20 of the Board's Decision.

However, in Hetzler, Table II summarizes the process steps used to make the materials disclosed therein and not the characteristics of the finished material as asserted by the

Board. As provided in the third column of Table II, the material during its fabrication was preheated to 205° F, **stretched at 195° F**, and annealed at 230° F. See Table II and col. 13, third paragraph, which is entitled "STRETCHING OF LAMINATES", of Hetzler. Thus, the 263% machine direction elongation of Sample A was measured while the material was being heated to 195° F and before it was annealed at 230° F.

Thus, the disclosure of Hetzler relied on by the Board is directed to Sample A at an intermediate step in its production and not in its final state. Nowhere does Hetzler disclose or suggest that Sample A could elongate in such a manner in its final form and without being heated to 195° F nor does Hetzler disclose or suggest that Sample A, while in the intermediate process step of being stretched to 263% while heated to 195° F, can be used as the loop portion of a mechanical fastening system.

As previously argued by Appellants, Hetzler fails to teach or even suggest that the finalized material, a microporous thermoplastic film, disclosed therein can be stretched to at least 2.0 times its relaxed length. Accordingly, nowhere does Hetzler teach or suggest a loop component of a mechanical fastening system that is elastically stretchable to at least 2.0 times a relaxed length in at least one direction.

Appellants' submit that the teachings of Hetzler must be taken as a whole, and not limited to the characteristics of the material at an intermediate stage of manufacture. While not precedential in this instance, the United States District Court for the Eastern District of Michigan faced a similar situation in *Verve, L.L.C. v. Crane Cams, Inc.* and found that the product in its final form is patently distinguishable over

a similar product at an intermediate step of its manufacturing. See pages 18 and 19 of *Verve, L.L.C. v. Crane Cams, Inc.*, 395 F.Supp.2d 558, (E.D.Mich., 2005) as attached hereto.

As a result, Appellants respectfully request that the Board's Decision upholding the Office's finding that claims 19 and 25 as being anticipated by Hetzler, and obvious by the combination of Morman '028, Morman '781, Morman '662, and Hetzler be reversed.

Respectfully submitted,

/Richard L. Bridge/

Richard L. Bridge, Reg. No. 40,529
ARMSTRONG TEASDALE LLP
One Metropolitan Square, 26th Floor
St. Louis, Missouri 63102
(314) 621-5070

RLB/PEB/tmg
Via EFS